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No. 92-1261

In The

Supreme Court of the United States

October Term, 1992

GARY ANTOINE, et al.,

Petitioners,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division Six

PETITIONERS' REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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I. RESPONDENT'S ARGUMENTS THAT NO JURISDICTION EXISTS ARE MISLEADING AND WITHOUT MERIT

A. Jurisdiction Exists Under 28 U.S.C. § 1257

Respondent argues that there is not jurisdiction under 28 U.S.C. § 1257 because the issue of the tidal boundary and its relation to petitioners' seawall has been remanded for further proceedings before the Coastal Commission.

Respondent conveniently ignores the Court of Appeal's directions that (1) the burden of proof is on

petitioners as to all issues, (2) petitioners must establish that their seawall is located on private property at all times in relation to a "continuously moving" tidal boundary as the beach profile undergoes seasonal variation *or the walkway and lateral access easement conditions are valid*, and (3) the standard of review of any decision of the Coastal Commission following remand is the substantial evidence rule. See summary of Court of Appeal decision at pages 14-15 of Petition for Writ of Certiorari ("Petition"), and Court of Appeal opinion in Appendix A to the Petition.

The difficulty with respondent's argument is that there is a final decision of the California courts *in this action*. If this Court does not grant the Petition, then, following further administrative proceedings, all of the questions presented in the Petition will again be raised by petitioners in further litigation. In general, in California, under the doctrine of the "law of the case," any ruling in an appellate court opinion that is "necessary" to the court's decision must be followed in all subsequent proceedings in the action, whether in the trial court or on a later appeal. *Clemente v. State of Calif.*, 40 Cal. 3d 202, 211-212, 219 Cal. Rptr. 445 (1985). The same limitation ordinarily binds the California Supreme Court when it considers a second appeal after a decision has been rendered by a court of appeal:

> "Where a decision upon appeal has been rendered by a District Court of Appeal and the case is returned upon a reversal, and a second appeal comes to [the California Supreme Court] . . . , the [California Supreme Court] generally will

> not inquire into the merits of said first decision, but will regard it as the law of the case."
>
> *Searle v. Allstate Life Ins. Co.*, 38 Cal. 3d 425, 434, 212 Cal. Rptr. 466 (1985).

This is particularly troubling in light of the California Supreme Court's denial of review in this case, combined with its order directing depublication of the Court of Appeal's opinion in this case (see Appendix C to Petition). In California, many legal commentators and at least some Court of Appeal justices interpret a denial of review accompanied by the California Supreme Court's depublication order as the California Supreme Court's disapproval of at least some aspect of the Court of Appeal opinion. *See, e.g., People v. Dee*, 222 Cal. App. 3d 760, 763-765, 272 Cal. Rptr. 208 (1990). *Cf. California Rules of Court*, Rule 28, Advisory Commission Comment ["a denial of review will not be an expression of the opinion of the California Supreme Court on the correctness of the judgment of the Court of Appeal or on the correctness of any discussion in the Court of Appeal opinion"] and Rule 979 ["An order of the Supreme Court directing depublication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision"].

In these circumstances, respondents' citation of *Laclede Gas Co. v. Public Service Commission*, 304 U.S. 398 (1938), and *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 69-72 (1948), are not dispositive. These cases involved constitutional challenges based on quite different facts than those present in this case, and these and many other cases of this Court make clear that the determination whether there is a final judgment under 28 U.S.C. § 1257

is a question to be answered on a case by case basis with reference to the practical effect of the state court judgment.

There is jurisdiction under 28 U.S.C. § 1257 because either (i) the final judgment of the California courts in this case is a final judgment for the purposes of Section 1257 or (ii) if the final judgment of the California courts is an interlocutory judgment as respondent asserts, then exceptions in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-485 (1975) are applicable.

"[A]s the cases have unfolded, the Court has recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come." *Id.* at 477. This Court has recognized at least four categories of cases in which the state court decision has been "treated as a final judgment for the purposes of 28 U.S.C. § 1257" and this Court has taken jurisdiction without awaiting the completion of the additional proceedings, in order to avoid " 'the mischief of economic waste and of delayed justice.' " *Id.* at 478 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124).

"In the first category of cases are those cases in which there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained" and, therefore, "the judgment of the state court on the federal issue is deemed final." *Cox, supra*, at 479. For the reasons discussed in the Petition and above, this is such a case. Without question, the federal issues have been adjudicated and petitioners

and this Court have every reason to believe that the Court of Appeal's directions and the respondent's consistent assertions and positions throughout this entire matter preordain the outcome of further proceedings. Petitioners' seawall will be subject to a walkway condition and lateral access easement.

As well, "there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review [in this Court] might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action. . . . *Id.* at 482-483. To the extent that the result on remand is not preordained to be a finding against petitioners as to the location of the tidal boundary, with a walkway condition and lateral access easement as mentioned above, this case would fall into the category of cases defined by the above-described situation.

Contrary to the Commission's assertions, there is jurisdiction under 28 U.S.C. § 1257.

B. All Questions Were Timely and Properly Raised Below

Respondent argues that petitioners failed to timely and properly raise Questions 2, 3 and 4. These very specific questions are fairly included in the questions and issues consistently raised by petitioners before the Commission in the administrative proceedings and throughout the court proceedings. See Statement of the Case in the Petition, at pages 3-17, and citations to record therein.

Petitioners set forth in detail in their Petition how and when the issues were raised.

C. Questions 4 and 5 Are Not Solely Questions of State Law

Respondent argues that Question 4 (whether the applicant or State has the burden of proof as to walkway and lateral access conditions) and Question 5 (whether unconstitutional conditions should be stricken from a permit) are not federal questions. Respondent is wrong. See *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). See also Petition at 26-29.

II. RESPONDENT'S ARGUMENTS DEMONSTRATE WHY THE ISSUES IN THIS CASE MERIT REVIEW BY THIS COURT

A. The Nexus Requirement of *Nollan* Requires Greater Judicial Scrutiny Than That Afforded by the Traditional Standard of Review Used by the Court of Appeal

Petitioners note that the Court of Appeal's opinion in *Nollan v. California Coastal Commission*, 177 Cal. App. 3d 719, 223 Cal. Rptr. 28 (1986), closely knit together the rationale for applying the substantial evidence rule in reviewing administrative proceedings and for not requiring any nexus between the impacts of the Nollans' home and the lateral access easement imposed by the Coastal Commission. Similar discussions of these issues appear in *Whaler's Village Club v. California Coastal Commission*, 173 Cal. App. 240, 218 Cal. Rptr. 122 (1985) and *Paoli v. California Coastal Commission*, 178 Cal. App. 3d 544, 223 Cal. Rptr. 792 (1986), which were implicitly overruled by

this Court in *Nollan* but are cited by respondent in support of the traditional, very deferential standard of review used by the Court of Appeal in this case. Respondent's Brief in Opposition, at 12.

Respondent's entire discussion of this issue demonstrates why this issue merits review by this Court – quite clearly, respondent wishes to avoid the effect of this Court's decision in *Nollan* adverse to respondent.

As discussed in the Petition, the Court of Appeal's use of the substantial evidence rule conflicts with this Court's *Nollan* decision and with other state court decisions following *Nollan*. As was also discussed in the Petition, the lower courts must apply the correct degree of scrutiny if they are to properly conduct a takings analysis under *Nollan*. The level of judicial scrutiny is the key factor in determining whether the Takings Clause provides protection to property owners from government exaction schemes.

The Court in *Nollan* characterized the Commission's abuse of its permitting authority as extortion and a leveraging of the police power. *Nollan*, 483 U.S. at 837. How are courts to ferret out such abuses of the permitting authority if they do not look closely at the findings *and* evidence underlying the governmental action? The present case, like *Nollan*, illustrates the need for heightened judicial scrutiny. Resolving the issue of the appropriate degree of scrutiny under the Takings Clause, created by the Court of Appeal's decision in this case, merits review by this Court.

B. Respondent's Arguments Concerning Tidal Boundaries Misstate the Holding of *People v. William Kent Estate*

Respondent acknowledges that the only reported California case concerning the public-private boundary along a sandy beach subject to seasonal variation is *People v. William Kent Estate*, 242 Cal. App. 2d 156, 51 Cal. Rptr. 215 (1964), but argue that it did not definitively resolve the issue of how the tidal boundary is to be located on a sandy beach. Petitioners disagree. In *Kent Estate*, the Court of Appeal reversed a trial court judgment granting an injunction requested by the State of California prohibiting defendant's interference with public access along a sandy beach below the ordinary high water mark. The injunction did not fix the location of this public-private boundary line. The State asserted that the ordinary high water mark was a constantly moving line, which shifted landward and seaward as the beach varied in width from summer to winter. Defendant had constructed a fence along the beach. The Court of Appeal stated that the evidence did not support a finding that the boundary was constantly migrating landward and seaward, "thus constantly transferring ownership of the intermediate land." *Id.* at 160. The *Kent Estate* Court of Appeal stated:

> "The evidence here is that the beach is some 80 feet wider in summer than in winter. If these changes be constant, in offsetting pairs occurring annually, they can hardly be gradual and imperceptible, and thus cannot meet the definitions of natural accretion and deliction. No effort was made by the parties to determine whether these movements are of substantially the same distance each year, thus affording a

> basis for fixing an average, mean, or ordinary line of the shore against which the average plane of the water at high tide may be placed to determine a reasonably definite boundary line. This effort should be made upon retrial. We recognize that the 'almost mathematical line bounding Blackacre' (Rest., Torts, § 943, p. 724) cannot be achieved, but somewhat greater certainty should be possible than the constantly moving line contemplated by the present decree. If not, the trial court should consider whether the uncertainty is so great as to warrant denial of injunctive relief (Rest., Torts, § 943; 27 Cal.Jur.2d 162)." *Id.* at 160-161.

Thus, *Kent Estate* establishes the rule that an average beach position be used to fix the location of the ordinary high water mark on a sandy beach along the California coast subject to seasonal variation in width. A continuously moving boundary line was rejected as the basis for the State to enforce public access along the beach.

In adopting a continuously moving line as the basis for fixing the location of the ordinary high water mark along petitioners' sandy beach subject to seasonal variation, the Court of Appeal made a "sudden change in state law, unpredictable in terms of relevant precedents" and thereby effected a taking, just as Justice Stewart warned against. See *Hughes v. Washington*, 389 U.S. 290 (1967) (Stewart, J., concurring).

III. CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Writ of Certiorari, petitioners respectfully request that the Court grant this Petition for Writ of Certiorari.

Dated: March 30, 1993

Respectfully submitted,

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